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Supreme Court, U.S.
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No. 88-1242

In The

Supreme Court of the United States

October Term, 1988

JACK R. HUGHES and MERLE A. PETTIT,

Petitioners,

v.

GENERAL MOTORS CORPORATION, a Delaware Corporation, THE GENERAL MOTORS RETIREMENT PROGRAM FOR SALARIED EMPLOYEES, and THE FINANCE COMMITTEE OF GENERAL MOTORS CORPORATION, jointly and severally,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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RULE 28.1 STATEMENT

General Motors Corporation's non-wholly owned subsidiaries and affiliates are:

Aralmex, S.A. de C.V. (Mexico)
Automotriz Gencor S.A. (Ecuador)
Autos y Maquinas del Ecuador S.A. (AYMESA) (Ecuador)
Companis Nacional de Direcciones Automotrices, S.A. de C.V. (Mexico)
Compresores Delfa, C.A. (Venezuala)
Convesco Vehicle Sales GmbH (West Germany)
Daewoo Motor Co., Ltd. (Korea)
Detroit Diesel Corporation (USA)
DHB – Componentes Automotives S.A. (Brazil)
Fabrica Colombians de Automotores S.A. ("Colomotores") (Columbia)
General Motors de Colombia S.A. (Columbia)
General Motors Egypt, S.A.E. (Egypt)
General Motors Iran Limited (Iran)
General Motors Kenya Limited (Kenya)
GM Allison Japan Limited (Japan)
GM Fanuc Robotics Corp. (USA)
Industries Mecaniques Meghrebiers, S.A. (Tunisia)
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Isuzu Motors Limited (Japan)
Isuzu Motors Overseas Distribution Corp. (Japan)
Kabelwerke Reinshagen GmbH (West Germany)
Kabelwerke Reinshagen Werk Berlin GmbH (West Germany)
Kabelwerke Reinshagen Werk Neumarkt GmbH (West Germany)
Moto Diesel Mexicana, S.A. de C.V. (Mexico)
Motor Enterprises, Inc. (USA)
New United Motor Manufacturing, Inc. (USA)
Omnibus BB Transportes, S.A. (Ecuador)

RULE 28.1 STATEMENT (Cont.)

Promotora de Partes Electronicos Automotrices (Mexico)
P.T. Mesin Isuzu Indonesia (Indonesia)
Senalizacion y Accessories del Automobil Yorka, S.A. (Spain)
Suzuki Motor Co., Ltd. (Japan)
Unicables, S.A. (Spain)

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COUNTERSTATEMENT OF THE CASE

Petitioners Hughes and Pettit both retired from their employment with the Oldsmobile Division of General Motors Corporation effective May 1, 1980. Prior to their retirements, both Petitioners had conversations with the Oldsmobile Division employee responsible for pension benefit administration to inquire about the possibility that Oldsmobile might subsequently decide to make available retirement benefits (pursuant to a "special early retirement plan") more attractive than the pension benefits to which Petitioners pursuant to Respondents' pension plan otherwise were entitled were they to retire effective May 1, 1980. Petitioners claim they retired only after they were told that no such special early retirement benefits would be made available.

On April 22, 1980, Oldsmobile's general manager authorized extension of special early retirement benefits to Oldsmobile employees who would attain the age of 58 or 59 by August 1, 1980. Neither Petitioner, both of whom would attain the age of 57 only by August 1, 1980, were eligible for the special early retirement plan benefits authorized on April 22.

After Petitioners retired, the special early retirement benefits authorized on April 22, 1980 were extended to Oldsmobile employees that would attain the age of 55, 56 or 57 by August 1, 1980. Because both Petitioners retired on May 1, 1980, neither received any special early retirement benefits, although both received the pension plan benefits due them under the terms of Respondents' pension plan effective May 1, 1980.

Petitioners filed a four-count Second Amended Complaint. In Counts I and II, Petitioners claimed that Respondents' failure to advise them of the unvested, unaccrued, special early retirement benefits under contemplation only at the time Petitioners retired violated §404 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §1104 (1982). In Count III, Petitioners claimed that Respondents' communication failure violated §510 of ERISA, 29 U.S.C. §1140 (1982), and in Count IV that Respondents' communication failure violated §502(a)(1)(B) of ERISA, 29 U.S.C. §1132(a)(1)(B) (1982).

The District Court dismissed Petitioners' Complaint by summary judgment. The Sixth Circuit affirmed that dismissal for reasons that differed than those identified by the District Court, concluding that Congress in ERISA neither provided nor intended that Petitioners have any remedy for the communication failure they allege.

REASONS FOR DENYING THE WRIT

1. ERISA §404 provides Petitioners no remedy because that provision imposes fiduciary duties only for the plan's benefit and for plan administration activities, which exclude the contemplation only of new plan benefits

Petitioners' argument that the Sixth Circuit should have allowed them to pursue a claim under §404 of ERISA, 29 U.S.C. §1104 (1982), misses the point of that provision. First, Congress never intended §404 to serve as the basis for benefit or damage recovery by any participant or beneficiary for his own benefit and not for the

benefit of the plan itself. See *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134 (1985).

Even were §404 intended to provide a basis for an individual's recovery for himself, however, that provision imposes no duty on any fiduciary to communicate its contemplation of theretofore nonexistent, unvested, unaccrued pension benefits. Compare §§101-111 of ERISA, 29 U.S.C. §§1021-1031 (1982), where, when Congress had in mind imposing a fiduciary duty of communication to participants and beneficiaries with respect to pension benefits, it declared that duty clearly and precisely. While Congress at §104(b)(1) of ERISA, 29 U.S.C. §1024(b)(1) (1982), did declare a fiduciary duty to communicate pension plan modifications to participants and beneficiaries *following* those modifications, it imposed no corresponding express fiduciary duty in any of those provisions or at §404 to advise of only contemplated modifications.

Most courts that have considered the issue have agreed that an employer is governed by ERISA's §404 fiduciary duties only while engaged in actual plan administration. *See, e.g., United Independent Flight Officers, Inc. v. United Air Lines, Inc.*, 756 F.2d 1262, 1268 (7th Cir. 1985); *Sutton v. Weirton Steel Div. of National Steel Corp.*, 724 F.2d 406, 410-411 (4th Cir. 1983), *cert. denied*, 467 U.S. 1205 (1984). *A fortiori*, even an employer that serves an ERISA plan as a fiduciary may negotiate changes in or otherwise contemplate amendments to pension plan benefits – all nonadministration activities – unrestricted by ERISA's §404 fiduciary obligations. *Id.* Thus, Respondents had no §404 fiduciary obligation to communicate with respect to contemplated only benefits.

Berlin v. Michigan Bell Telephone Co., 858 F.2d 1154 (6th Cir. 1988), is not inconsistent with the Sixth Circuit's refusal to permit Petitioners to derive from §404 of ERISA some fiduciary obligation to communicate contemplated only pension benefits. In fact, in *Berlin*, after acknowledging the Sixth Circuit opinion and determinations with respect to Petitioners' claims, the Court distinguished the two cases on their facts and implicitly declared the two opinions consistent. *Berlin*, 858 F.2d at 1162-1163, n.6. The ultimate determinations in *Berlin* and the Sixth Circuit's determination of Petitioners' claims differ not because of any fundamental inconsistent interpretation or application of ERISA but only because the dissimilar facts required dissimilar conclusions.

2. Petitioners' admission that Respondents' plan effective when they retired includes no provision for the benefits they seek precludes their pursuit of an ERISA §502(a)(1)(B) remedy

Petitioners' argument that the Sixth Circuit should have allowed them to pursue a claim under §502(a)(1)(B) of ERISA, 29 U.S.C. §1132(a)(1)(B) (1982), for pension benefits for which Petitioners' acknowledge they have no claim under the literal terms of Respondents' ERISA plan as it applies to them is foreclosed by the unequivocal, unambiguous language of that provision. That is, the essence of Petitioners' claim is that they have incurred damage because, having retired when the benefits they seek were nothing more than unvested, unaccrued, and in fact in Respondents' contemplation only, they have no right to those benefits. That being so, §502(a)(1)(B), as

that provision unequivocally and unambiguously contemplates a civil action only for benefits actually due "under the terms of his plan" and "under the terms of the plan," has no application to Petitioners' circumstance. The Sixth Circuit thus properly refused to expand §502(a)(1)(B) beyond "what Congress has plainly and intentionally provided." *Commissioner v. Asphalt Products Co.*, 107 S. Ct. 2275, 2278 (1987).

3. Petitioners' effort to pursue an ERISA §510 remedy is precluded by the literal language of that provision and has no support in legislative history

Petitioners' argument that the Sixth Circuit should have interpreted §510 of ERISA, 29 U.S.C. §1140 (1982), to provide a cause of action for an employer's failure to accurately advise employees of unvested, unaccrued pension benefits under contemplation only finds no support in the provision's language or legislative history. That being so, the Sixth Circuit properly refused to interpret §510 to provide Petitioners any such cause of action.

It is axiomatic that " 'the starting point involving construction of a statute is the language itself.' " *Southeastern Community College v. Davis*, 442 U.S. 397, 405 (1979). If that language is unambiguous, no resort to legislative history to obtain an interpretation inconsistent therewith is appropriate. *See, e.g., Ex parte Collett*, 337 U.S. 55, 61 (1949). Unless statutorily defined, the courts are to give to unambiguous language its "ordinary, contemporary, common meaning." *Diamond v Chakrabarty*, 447 U.S. 303, 308 (1980) (citation omitted). Any ambiguity, however, is to be resolved consistent with "the legislative history and statutory purpose." *Id.* at 315.

Certainly nothing is ambiguous about §510. The words "discharge, fine, suspend, expel, discipline or discriminate" have an "ordinary, contemporary, common meaning" that by no definition suggest that Congress with that language intended to provide any cause of action to employees that resign their employment not because of any harassment or discrimination, but only because they are unaware that their employer has under contemplation additional unvested, unaccrued pension benefits.

Moreover, were resort to legislative history necessary to interpret §510, that history provides Petitioners no support. Petitioners acknowledge that that history reveals only that Congress intended §510 to protect employees "specifically" against "economic sanctions or violent reprisals" and "the type of harassment which does not say that one is fired, but makes living such a hell that a person wishes he did not have to hang on and endure." *West v. Butler*, 621 F.2d 240, 245 (6th Cir. 1980), quoting from 119 Cong. Rec. 30374, *reprinted in* ERISA Legislative History at 1774-75. That acknowledged intent precluded the Sixth Circuit from giving §510 the interpretation Petitioners sought even were the language of §510 ambiguous.

4. Petitioner's argument for a federal common law remedy if ERISA provides them none requires that the judiciary assume an unauthorized legislative function

Petitioners' argument that the Sixth Circuit should have fashioned for them a federal common law remedy if

ERISA provides them none acknowledges none of this Court's repeated observations of the judiciary's very limited, carefully circumscribed authority to assume that law-making function from Congress, and finds no support in that narrow authority. In fact, the circumstances under which the federal courts may create federal common law are "few and restricted," limited essentially to those occasions "necessary to protect uniquely federal interests" and when "Congress has given the courts the power to develop substantive law:"

> [A]bsent some congressional authorization to formulate substantive rules of decision, federal common-law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases.

Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640 (1981) (citations omitted). *See also Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77 (1981); *Wheeldin v. Wheeler*, 373 U.S. 647 (1963).

ERISA includes no congressional grant of authority to the federal courts to create any common law cause of action for conduct Congress has not proscribed. Instead, with ERISA Congress "with . . . evident care" has enacted an "interlocking, interrelated, and interdependent remedial scheme, which is in turn part of a 'comprehensive and reticulated statute.' " *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 146-147 (1985) (citations omitted). Given that comprehensiveness, the federal courts are without authority to create a cause of action that might "upset" such a "carefully considered" program. *Northwest Airlines*, 451 U.S. at 97.

It is true, certainly, that Congress intended that ERISA and its remedies supplant completely state regulation of ERISA plans and that the courts would develop "a body of Federal substantive law . . . to deal with issues involving rights and obligations under [ERISA] plans." *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 56 (1987). It is, moreover, consistent with that intent and no infringement of Congressional authority that the federal courts develop a body of federal common law, or judicial "gloss," as they interpret imprecise ERISA provisions; that authority, however, is no license to create a common law cause of action where Congress provided none for conduct Congress has not proscribed:

> In almost any statutory scheme, there may be a need for judicial interpretation of ambiguous or incomplete provisions. But the authority to construe a statute is fundamentally different from the authority to fashion a new rule or to provide a new remedy which Congress has decided not to adopt.

Northwest Airlines, 451 U.S. at 97.

This Court has previously refused an invitation to imply from §409 of ERISA, 29 U.S.C. §1109 (1982), a cause of action for extra-contractual damages caused by wrongful processing of benefit claims, satisfied that nothing in the legislation or legislative history authorizes the federal courts to fashion such a remedy, even for conduct Congress had expressly proscribed. *Massachusetts Mutual*, 473 U.S. 134. That rationale is equally persuasive here where Congress at §§101-111 of ERISA, 29 U.S.C. §1021-1031 (1982), after presumptively careful deliberation, has established specifically a fiduciary's reporting and disclosure obligations and included nothing requiring the

disclosure Petitioners would have the judiciary require as the basis of a common law cause of action.

Whatever the merit of *Carl Colteryahn Dairy, Inc. v. Western Pennsylvania Teamsters & Employers Pension Fund*, 847 F.2d 113 (3rd Cir. 1988), *cert. denied*, 57 U.S.L.W. 3486 (1989), *Kentucky Laborers Dist. Council Health & Welfare Fund v. Hope*, 861 F.2d 1003 (6th Cir. 1988), and *Whitworth Bros. Storage Co. v. Central States, Southeast & Southwest Areas Pension Fund*, 794 F.2d 221 (6th Cir. 1986), *cert. denied*, 479 U.S. 1007 (1986), those cases provide no support for Petitioners' cause. While in each case the Court did declare a remedy not found in ERISA's provisions, it did so for conduct that indisputably violated an ERISA provision or an ERISA plan. In contrast, Petitioners, who would have had the Sixth Circuit first declare unlawful conduct neither proscribed by Congress nor inconsistent with Respondents' ERISA plan and only then declare a remedy therefor, would have had the Court assume a clearly legislative function.

Petitioners' plea for a cause of action not provided by ERISA appropriately is directed only to Congress:

> The choice we are urged to make is a matter of high policy for resolution within the legislative process after the kind of investigation, examination, and study that legislative bodies can provide and courts cannot. That process involves the balancing of competing values and interests, which in our democratic system is the business of elected representatives. Whatever their validity, the contentions now pressed on us should be addressed to . . . the Congress. . . .

Texas Industries, 451 U.S. at 647 (citation omitted). The "equitable considerations" Petitioners advance don't

make Congress any less the appropriate forum for the relief they seek. *Northwest Airlines*, 451 U.S. at 97 n.41.

CONCLUSION

ERISA provides Petitioners no remedy for the conduct they allege. Moreover, Congress has granted the judiciary no authority to create for Plaintiffs any federal common law cause of action. Consequently, the Sixth Circuit properly dismissed Petitioners' claims. On this record, whether that dismissal was best characterized as one for Petitioners' failure to establish jurisdiction or for Petitioners' failure to state a claim is moot.

For all of the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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